IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANIEL VALENTINE, Appellant.	)	No. 63666-9-I DIVISION ONE UNPUBLISHED OPINION FILED: June 28, 2010

Becker, J. — When one of a defendant's convictions is vacated on appeal on double jeopardy grounds, but the exceptional sentence originally imposed is still supported and there is no change to the standard range, a trial court may decline to reconsider the exceptional sentence and simply correct the judgment and sentence to reflect the vacation of the conviction. An appeal from such a decision is properly dismissed because, in the absence of an exercise of independent judgment by the trial court, there is nothing for an appellate court to review.

Appellant Daniel Valentine was convicted of assault and attempted murder in 1999. The court found that the convictions were the same criminal conduct. Thus, they did not affect Valentine's offender score for sentencing. The trial court found that Valentine had acted with deliberate cruelty. Based on

the aggravating factor, the court imposed an exceptional sentence of 240 months on each count, to run concurrently.

On direct appeal, this court affirmed the attempted murder conviction, vacated the assault conviction on grounds of double jeopardy, and affirmed the exceptional sentence. State v. Valentine, 108 Wn. App. 24, 29, 29 P.3d 42 (2001), review denied, 145 Wn.2d 1022 (2002). On March 28, 2002, this court mandated the case to superior court for "further proceedings in accordance with the attached true copy of the decision."

The trial court took no action on the mandate until 2009. In 2009, Valentine moved for a hearing on the mandate and asked the court to resentence him in view of the vacated conviction and the change in the law that occurred with Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). He claimed he could rely on Blakely because his judgment and sentence were not yet final. Valentine took the position that at resentencing, the State should not be permitted to seek an exceptional sentence.

The trial court entered an order vacating the assault conviction as required by the mandate, and amended the original judgment and sentence accordingly, but declined to consider altering the sentence. The trial judge stated his reasoning as follows:

> While it can be argued that a resentencing could yield a different result, this was, as has been described by plaintiff's counsel and by the State, a singular event with a singular victim, and a singular fact pattern. There was no enhancement of the offender score, because this was in fact the same act. There is no reduction in the offender score because count two was vacated. As I read it, the

> Court of Appeals did not order resentencing, and this order vacating count two is sufficient to comply with that Court of Appeals' mandate.
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> The Certificate of Finality in this case was dated June 5th, 2003. The Court of Appeals' mandate was April, 2002. Blakely vs. Washington, 542 U.S. 296, was 2004. This court rules that Blakely vs. Washington is inapplicable as it is not retroactive. It is my conclusion that State v. Valentine became final when the time for a petition for certiorari elapsed, ninety days after the June 3rd, 2003 Certificate of Finality.[1]

Valentine appeals from the order, contending that the trial court abused its discretion in denying his request to be resentenced.

We grant the State's motion to dismiss the appeal. This case is controlled by State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009). Kilgore was originally convicted of three counts of rape of a child and four counts of child molestation in 1998. The trial court found five aggravating factors and imposed 560 month exceptional, concurrent sentences on each of the seven counts. The Court of Appeals reversed two counts, but affirmed five and remanded for further lawful proceedings. The Washington Supreme Court affirmed. The mandate became final for purposes of retroactivity analysis on January 5, 2003, before the Supreme Court's opinion in Blakely.

On remand in October 2005, Kilgore argued the trial court had to resentence him under Blakely. The trial court declined and signed an order striking the two counts, correcting the judgment and sentence, and correcting his offender score. On appeal, the Washington Supreme Court found the trial court

[1] Report of Proceedings (May 11, 2009) at 23-24.

did not abuse its discretion by declining to resentence Kilgore. Although the number of his convictions had been reduced, his presumptive sentencing range remained the same. Kilgore, 167 Wn.2d at 42-43. Where a trial court exercises no independent judgment on remand, there is no issue to review on appeal. Kilgore, 167 Wn.2d at 40. The decision to simply correct a judgment and sentence is not an appealable act of independent judgment by the trial court. In such a case, "it is the original judgment and sentence entered by the original trial court that controls the defendant's conviction and term of incarceration." Kilgore, 167 Wn.2d at 40-41.

The court also rejected Kilgore's argument that Blakely was an intervening change in law before the trial court took action on remand that revived his right to appeal:

> In essence, he asks us to waive our rules of appellate procedure to allow application of a new rule of law to defendants who have otherwise exhausted their right to appeal as long as there is a *possibility* of a change to their judgment and sentence. Finality occurs, however, when the "'*availability* of appeal'" had been exhausted. The fact that the trial court had discretion to reexamine Kilgore's sentence on remand is not sufficient to revive his right to appeal. Our rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue. We will not waive this rule to make exceptions for defendants where a mere possibility of direct review exists.

Kilgore, 167 Wn.2d at 43 (footnote omitted) (citations omitted). Finding no error by the trial court, the Supreme Court affirmed this court's order dismissing Kilgore's appeal.

Valentine fails to distinguish his case from Kilgore in any material respect.

He attempts to do so on the basis that this court reviewed an issue concerning his exceptional sentence in the first appeal, whereas in Kilgore's first appeal, there was no issue concerning the exceptional sentence. Therefore, he argues, an appellate court has discretion to review the exceptional sentence again under RAP 2.5(c)(2). The cited rule authorizes this court to review a previous appellate decision in a case that is once again "before the appellate court" after a remand:

> The following provisions apply if the same case is again before the appellate court following a remand:
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> . . . .
>
> (2) *Prior Appellate Court Decision*. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5(c).

Valentine's original sentence became final when the mandate issued in 2002. Because the time for an appeal long ago expired, his appeal is not properly "before the appellate court." Therefore, RAP 2.5(c)(2) does not apply. In the absence of an appealable decision by the trial court, this court does not have discretion to revisit its earlier decision.

Valentine argues that the distinction in Kilgore between ministerial corrections and independent judgment is mere semantics. He contends that if the trial court had termed his remand hearing a "resentencing," we would have to recognize his sentence as if it had been reimposed by an act of independent

judgment rather than as being ministerially corrected and otherwise left undisturbed. The dissent in Kilgore unsuccessfully advanced the same argument. Kilgore, 167 Wn.2d at 47 (Sanders, J. dissenting) ("Under the majority's view, a trial court on remand renders an independent judgment on remand only when it holds a resentencing hearing—regardless of outcome—but when it reaffirms the prior sentence by not holding a hearing, it does not. This doesn't make sense."). We follow the majority opinion, under which there is no appeal from a trial court's discretionary decision to leave a previously imposed exceptional sentence in place rather than considering it anew. See State v. Barberio, 121 Wn.2d 48, 51, 846 P.2d 519 (1993). Any label that is given to the hearing at which the trial court considers making such a change is not material.

Valentine also argues he has a constitutional right to resentencing under United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972), and State v. Davenport, 140 Wn. App. 925, 167 P.3d 1221 (2007), review denied, 163 Wn.2d 1041 (2008). According to Valentine, these cases stand for the proposition that resentencing is required by due process whenever at least one of several convictions is reversed on appeal. The holdings in Tucker and Davenport, however, are considerably narrower than as stated by Valentine.

In Tucker, the Court determined sentencing was required where two of Tucker's prior convictions, explicitly relied on by the sentencing court, were determined to be invalid under Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The Court remanded, ruling that it would violate the

principle of Gideon for the two invalid convictions where Tucker did not have counsel to count against him in sentencing. Tucker, 404 U.S. at 449.

The defendant in Davenport was convicted of two counts of first degree robbery and sentenced to life without parole as a persistent offender. One of the counts was reversed on appeal and the case remanded for resentencing. The trial court on remand declared it would not hold a resentencing hearing because it had no discretion and was required to sentence Davenport to life without parole as a persistent offender based upon his remaining robbery conviction. The Court of Appeals reversed and remanded because its original mandate specifically ordered resentencing, Davenport's offender score and presumptive sentencing range had changed, and the defense offered arguments that could affect the imposition of a life sentence. Davenport, 140 Wn. App. at 931-32.

Valentine's case is factually unlike Tucker and Davenport. Neither case compels resentencing here. As far as due process is concerned, Valentine had the opportunity to ask the sentencing judge to reconsider the sentence. The judge heard the argument and declined to reconsider. No more was required.

Because Valentine presents no appealable issue, we grant the State's motion to dismiss the appeal.

Appeal dismissed.

Becker, J.

WE CONCUR: